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EXAMINER

HAND, MELANIE JO

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRYAN KEITH FELLER and MATTHEW JOSEPH MACURA

Appeal 2009-002682
Application 10/600,774
Technology Center 3700

Decided:¹ June 19, 2009

Before DONALD E. ADAMS, ERIC GRIMES, and MELANIE L.
McCOLLUM, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims 1, 4-6, 10, 11, 15, and 16, all of the pending claims, which are directed to an absorbent

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

article. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

The Specification discloses an “absorbent article capable of reliably achieving an improved body-fitting profile” (Spec. 3:2-3).

Claims 1, 4-6, 10, 11, 15, and 16 are on appeal. Claim 1 is representative and reads as follows:

Claim 1: An absorbent article comprising,
a. a fluid permeable facing layer having a first elastic modulus, wherein the facing layer comprises a topsheet and a secondary topsheet;
b. an absorbent core joined to the facing layer, the absorbent core having a second elastic modulus;
c. wherein at equal strain from about 1% to about 5% the first elastic modulus is greater than the second elastic modulus and wherein the facing layer is joined to the absorbent core at substantially the entirety of their respective interfacial surfaces; and
d. a fluid impermeable backsheet joined to the facing layer.

The claims stand rejected under 35 U.S.C. § 103(a) as follows:

- claims 1, 4-6, and 11 in view of Weisman² and Takahashi;³
- claim 10 in view of Weisman, Takahashi and Cinelli;⁴ and
- claims 15 and 16 in view of Weisman, Takahashi and Ohashi.⁵

² Weisman et al., US 4,865,596, Sep. 12, 1989

³ Takahashi et al., US 6,329,465 B1, Dec. 11, 2001

⁴ Cinelli et al., US 2002/0013565 A1, Jan. 31, 2002

⁵ Ohashi et al., US 2002/0065498 A1, May 30, 2002

OBVIOUSNESS I

Issue

The Examiner has rejected claims 1, 4-6, and 11 under 35 U.S.C. § 103(a) as being obvious in view of Weisman and Takahashi.

The Examiner finds that Weisman discloses an absorbent article meeting most of the limitations of claim 1, but “Weisman does not teach a facing layer that comprises a topsheet and a secondary topsheet” (Ans. 3-4). The Examiner finds that “Takahashi teaches a multi-layer liner material comprised of ethylene copolymer layers ... [and] thus Takahashi teaches a facing layer material comprising a topsheet and a secondary topsheet” (*id.* at 4). The Examiner also finds that “Takahashi teaches that this film has excellent transparency, mechanical strength and moldability,” and reasons that it would have been obvious to one of ordinary skill in the art to substitute the Takahashi liner material for the Weisman liner material “to provide a facing layer with increased transparency, strength and moldability” (*id.* at 4).

Appellants contend that the Examiner erred in concluding that one of skill in the art would have been motivated to substitute Takahashi’s multilayer film for the facing layer of Weisman’s absorbent article because, although the multilayer film of Takahashi may be oxygen permeable, it is not liquid permeable (App. Br. 4).

The issue with respect to this rejection is: Does the evidence of record support the Examiner’s conclusion that one of skill in the art would have been motivated to substitute the multilayer film of Takahashi for the facing layer of Weisman’s absorbent article?

Findings of Fact

1. Weisman discloses an absorbent composite structure that comprises blown microfibers, nonabsorbent synthetic staple fibers, “a fluid control system in particle form,” and a “hydrophilizing agent” (Weisman, col. 2, ll. 36-44).

2. Weisman discloses “disposable absorbent articles which utilize the absorbent composite structures herein as at least a portion of the fluid-absorbing ‘core’ element. ... Examples of absorbent articles include disposable diapers, sanitary napkins,” etc. (*id.* at col. 18, ll. 18-25).

3. Weisman discloses that “[a]bsorbent articles herein will frequently comprise a substantially liquid impervious backing sheet, a liquid pervious, relatively hydrophobic topsheet and an absorbent core” (*id.* at col. 18, ll. 31-34).

4. Weisman discloses that “[r]elatively hydrophobic, liquid pervious topsheets can comprise any material such as polyester, polyolefin, rayon and the like which is substantially porous and permits a fluid to readily pass therethrough into the underlying absorbent core” (*id.* at col. 18, ll. 39-44).

5. Takahashi discloses “an ethylene copolymer composition having excellent moldability and capable of producing films and molded products of excellent transparency and mechanical strength” (Takahashi, col. 1, l. 66 through col. 2, l. 2).

6. Takahashi discloses that “molded products according to the invention are formed from the ethylene copolymer composition” and that [e]xamples of the molded products include single-layer films, multi-layer films, injection molded products, extrusion molded products, fibers, foam products and electric wire sheaths. More

specifically, there can be mentioned agricultural films (single-layer, multi-layer), water barrier sheets, multi-layer films, packaging films (multi-layer films, stretch films, heavy-duty packaging films), multi-layer barrier films, [etc.].

(*Id.* at col. 32, l. 56 through col. 33, l. 4.)

7. Takahashi discloses that a “water barrier sheet is formed from the ethylene copolymer composition” and that the “water barrier sheet may be a multi-layer sheet wherein the outer layer or the inner layer made of the composition ... is combined with other substrates, reinforcing materials or other drainage materials” (*id.* at col. 38, ll. 23-31).

8. Takahashi discloses that the

single-layer film is most adapted for use in the stretch overwrapping and skin packaging methods. As required for the stretch overwrapping, the single-layer film produced from the ethylene copolymer composition ... exhibits surprisingly excellent oxygen permeability.

Oxygen permeation is particularly useful in the stretch wrapping of individual cuts of red meat ... , where the oxygen permeation allows fresh red meat to “bloom” to the desired bright red color.

(*Id.* at col. 45, ll. 14-27.)

9. Takahashi discloses “a multi-layer film structure [that] comprises at least 3 layers (e.g., an A/B/A structure), wherein each outer layer comprises at least one ethylene copolymer composition ... , and at least one core layer or hidden layer comprises high-pressure low-density polyethylene” (*id.* at col. 46, ll. 15-23).

10. Takahashi discloses that “articles which can be produced by the use of the novel elastic fiber and fabric disclosed in the present specification

include composite fabric articles desired to have elastic parts, such as diapers” for which “elasticity is desired for a waist [sic] band part to prevent slip-down of diaper and a leg band part to prevent leakage” (*id.* at col. 73, ll. 19-24).

11. Takahashi discloses that “[b]y the use of the novel elastic fiber and fabric disclosed in this specification, structures having a combination of elasticity and air permeability can be manufactured” (*id.* at col. 73, ll. 28-30).

Principles of Law

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993).

“In determining whether obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d 1573, 1581 (Fed. Cir. 1995) (internal quotations omitted).

Analysis

Claim 1 is directed to an absorbent article comprising, among other things, a fluid permeable facing layer comprising a topsheet and a secondary topsheet.

Appellants contend that the Examiner erred in concluding that one of skill in the art would have been motivated to substitute the multilayer film of Takahashi for the facing layer of Weisman's absorbent article because, although the multilayer film of Takahashi may be oxygen permeable, it is not liquid permeable (App. Br. 4).

Appellants' arguments are persuasive. Weisman discloses an absorbent article. Takahashi discloses an ethylene copolymer composition that may be used to make a multilayer film with at least one layer comprising the ethylene copolymer composition. However, Takahashi reasonably appears to describe the films as water impermeable because Takahashi discloses that the film can be used to package red meat and to form a water barrier sheet. The Examiner has not pointed to any disclosure in Takahashi that shows the films are water permeable, nor has the Examiner adequately explained why one of skill in the art would have been motivated to substitute the liquid impermeable multi-laminate layer of Takahashi for the inner layer (i.e., facing layer) of Weisman. Such a substitution would result in an absorbent article with an absorbent core, but with liquid impermeable layers on both faces.

In response to Appellants' arguments, the Examiner reasons that Takahashi discloses "that the elastic fiber and fabric disclosed can be used in the production of composite articles such as diapers" (Ans. 7). The Examiner also points to Takahashi's disclosure that the elastic fiber and fabric are useful for structures described in Wade (U.S. Patent 2,957,512), and reasons that the material of Wade "can certainly be used as a topsheet material" (Ans. 7)

We are not persuaded by the Examiner's reasoning. The diaper references in Takahashi cited by the Examiner might suggest the use of the ethylene copolymer composition for elastic portions of a diaper but not the facing layer. Likewise, Takahashi only suggests using its elastic fiber and fabric in the products described by Wade. Takahashi states that, for example, one of Wade's elastic components "can be replaced by the novel elastic fiber and fabric" (Takahashi, col. 73, ll. 33-36). Whether Wade discloses a material that can be used as a topsheet is immaterial because the Examiner's rejection does not rely on Wade's disclosure.

The rejection of claim 1 as being obvious in view of Weisman and Takahashi is reversed. The rejection of claim 4-6 and 11, which depend from claim 1, also is reversed for the reasons discussed above.

Conclusions of Law

The evidence of record does not support the Examiner's conclusion that one of skill in the art would have been motivated to substitute the multilayer film of Takahashi for the facing layer of Weisman's absorbent article.

OBVIOUSNESS II

The Examiner has rejected claim 10 under 35 U.S.C. § 103(a) as being obvious in view of Weisman, Takahashi and Cinelli.

Claim 10 depends from claim 1. The Examiner relies on Weisman and Takahashi as discussed above, and provides Cinelli to supply dependent claim limitations. As discussed above, however, the Examiner has not

adequately explained how Weisman and Takahashi would have suggested the absorbent article of claim 1.

Although the Examiner cites Cinelli as disclosing a multilaminate facing layer (Ans. 5), the Examiner relied on Takashi in combination with Weisman for the elastic modulus requirements of claim 1 (i.e., at equal strain from about 1% to about 5%, the elastic modulus of the facing layer is greater than the elastic modulus of the absorbent layer) (see Ans. 3-4). Thus, even assuming that Cinelli discloses a multilaminate facing layer that would be obvious to use in Weisman's diaper, the Examiner has not shown that the combination would result in the invention of claim 1 or, by extension, claim 10. The rejection of claim 10 is reversed

OBVIOUSNESS III

The Examiner has rejected claims 15 and 16 under 35 U.S.C. § 103(a) as being obvious in view of Weisman, Takahashi and Ohashi.

Claims 15 and 16 depend from independent claim 1. The Examiner relies on the combination of Weisman and Takahashi as discussed above, and provides Ohashi to supply dependent claim limitations. As discussed above, however, the Examiner has not adequately explained how Weisman and Takahashi would have suggested the absorbent article of claim 1, and the rejection of claims 15 and 16 is reversed.

SUMMARY

We reverse the rejection of claims 1, 4-6, 10, 11, 15, and 16 under 35 U.S.C. § 103(a) as being obvious based on the cited references.

REVERSED

Ssc:

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